Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1158

In the Supreme Court of the United States

OCTOBER TERM, 1986

CONRAD SCHELLONG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MICHAEL WOLF
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the doctrine of collateral estoppel bars the relitigation in a deportation proceeding of issues litigated and determined in an earlier denaturalization proceeding involving the same parties.

2. Whether petitioner's earlier denaturalization proceedings resolved the question whether petitioner willfully made material misrepresentations in the visa application process.

3. Whether petitioner's service as a guard and a supervisor of guards at two Nazi concentration camps constituted "assistance in persecution" under the Holtzman Amendment to the Immigration and Nationality Act, 8 U.S.C. 1251(a)(19).

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Statement 2

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Allen v. *McCurry*, 449 U.S. 90 (1980) 6

Fedorenko, In re, Interim Dec. 2963 (BIA Apr. 17, 1984) 6, 10

Fedorenko v. *United States*, 449 U.S. 490 (1981) 11

INS v. *Jong Ha Wang*, 450 U.S. 139 (1981) 8

INS v. *Rios-Pineda*, 471 U.S. 444 (1985) 8

Laipenieks v. *INS*, 750 F.2d 1427 (9th Cir. 1985) 12

Montana v. *United States*, 440 U.S. 147 (1979) 6

Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 (1979) 6, 7

Rowoldt v. *Perfetto*, 355 U.S. 115 (1957) 7

Page

Cases—Continued:

Title v. *INS*, 322 F.2d 21 (9th Cir. 1963) 7, 8

United States v. *Demjanjuk*, No. 85-3198 (6th Cir. June 28, 1985), cert. denied, No. 85-846 (Dec. 16, 1985) 7

United States v. *Kairys*, 782 F.2d 1374 (7th Cir. 1986), cert. denied, No. 85-1752 (May 27, 1986) 11

United States v. *Mendoza*, 464 U.S. 154 (1984) 6

United States v. *Sprogis*, 763 F.2d 115 (2d Cir. 1985) 12

Constitution and statutes:

U.S. Const. Art. I, § 9, Cl.3 (Ex Post Facto Clause) 5

Displaced Persons Act of 1948, ch. 647, § 2, 62 Stat. 1009-1010, amended by Displaced Persons Act of 1948 Amendments, ch. 262, §§ 1-3, 64 Stat. 219-220 10

Immigration and Nationality Act, 8 U.S.C. (& Supp. III) 1101 *et seq.* :

8 U.S.C. 1251(a)(19) 5, 10, 11

8 U.S.C. 1252(b) 6

8 U.S.C. 1254(a) 8

8 U.S.C. 1451(a) (§ 340(a)) 4

Page

Miscellaneous:

H.R. Rep. 1365, 82d Cong., 2d Sess. (1952) 6

H.R. Rep. 95-1452, 95th Cong., 2d Sess. (1978) 11

S. Rep. 1137, 82d Cong., 2d Sess. (1952) 6

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1158

CONRAD SCHELLONG, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 805 F.2d 655. The opinion of the Board of Immigration Appeals (Pet. App. B1-B18) is unreported. The opinion of the immigration judge is not officially reported.[1] An earlier opinion of the court of appeals in petitioner's denaturalization proceedings (Pet. App. C1-C15) is reported at 717 F.2d 329. The opinion of the district court in petitioner's denaturalization proceedings (Pet. App. D1-D19) is reported at 547 F. Supp. 569.

---

[1]The opinion of the immigration judge is not reproduced in the appendix to the petition. We have lodged a copy of the opinion with the Clerk.

JURISDICTION

The judgment of the court of appeals (Pet. App. E1) was entered on October 15, 1986. A petition for rehearing was denied on November 14, 1986 (Pet. App. F1). The petition for a writ of certiorari was filed on January 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Germany in 1910. At the time that Adolf Hitler was coming into power in the spring of 1932, petitioner joined the *Sturmabteilungen*, the paramilitary unit of the Nazi Party more commonly known as the "Storm Troopers" or the "Brown Shirts." In December of that year, petitioner joined the Nazi Party and the *Schutzstaffel*, or SS, which served as the protective and intelligence arm of the Party. In 1934, after Hitler had assumed power, petitioner joined the *SS Sonderkommando "Sachsen"* (SS Special Commando "Sachsen"), a party organization whose members served as guards at the Sachsenburg Concentration Camp in Germany,[2] which housed Jews and other groups deemed inimical to the Reich.[3] At the camp, petitioner supervised a platoon of guards, first as a corporal and later as a second lieutenant. He also served, on a rotating basis, as the security officer for the entire camp. Pet. App. A2-A3, B8, C2-C3, D2-D3.

---

[2]The SS Special Commando "Sachsen" was later renamed the *SS Wachverbande "Sachsen"* (the SS Guard Unit) and later still the *SS Totenkopfverbaende "Sachsen"* (the SS Death's Head Unit). Pet. App. D4.

[3]Inmates at Sachsenburg were incarcerated because of their political views, religion, or race, and they included opponents of the Nazi regime, clergy, and Jews. Inmates were forced to perform onerous labor and were subjected to punishments such as flogging. Pet. App. A14-A15, D3 n.1, D4.

In late 1936, petitioner was transferred from Sachsenburg to the Dachau Concentration Camp in Germany. Between 1936 and 1939, petitioner commanded several units of the *SS Totenkopfverbaende* (the SS Death's Head Unit) at Dachau and was promoted to the rank of captain. In November 1938, while petitioner was serving at Dachau, the number of prisoners there increased from 4,000 to 14,000, as the result of the *Kristallnacht*, a pogrom throughout Germany that included the arrest of thousands of Jews and their incarceration at Dachau. The treatment of prisoners at Dachau was inhuman and entailed forced labor and severe punishment arbitrarily imposed.[4] In late 1939, the Dachau prisoners were moved to other camps, and petitioner was transferred from Dachau. He became a member of the *Waffen SS*, a military organization created in late 1939. Petitioner served in the *Waffen SS* until the end of World War II. Pet. App. A3-A4, A14-A15, D6, D13.

2. In December 1956, petitioner applied for a United States visa. In his visa application, petitioner did not mention his two-year period of service at the Sachsenburg Concentration Camp or his three-year service at Dachau.[5] Petitioner obtained a visa the following month, and he entered the United States in February 1957. In 1962, petitioner applied for naturalization. He omitted from his naturalization application any mention of his association with the Brown Shirts in 1932 or with the SS Death's Head Units at Sachsenburg and Dachau. In addition, petitioner stated

---

[4]Although there was no evidence that petitioner personally abused any prisoner at Dachau, petitioner admitted that he was aware of the inhumane treatment of prisoners there (Pet. App. D6).

[5]Petitioner's visa application described his prior residences as follows (Pet. App. A4):

> Birth—1911, Dresden, Germany; 1911-1934, Leipzig, Germany; 1934-1939, German Waffen SS; 1939-1945, Waffen SS during the war[.]

that he had been "only [a] soldier" and had never served in a concentration camp (Pet. App. D9). In 1962, petitioner was naturalized as a United States citizen (*id.* at A4-A5, D6-D9).

3. In 1981, the government brought suit under Section 340(a) of the Immigration and Nationality Act, 8 U.S.C. 1451(a), to revoke petitioner's citizenship. After a bench trial in the United States District Court for the Northern District of Illinois, the district court held that the government had proved, by clear, unequivocal, and convincing evidence, that petitioner had willfully misrepresented and concealed material facts in his visa and citizenship applications (Pet. App. D12; 547 F. Supp. 569).[6] The court of appeals affirmed the district court's judgment revoking petitioner's citizenship (Pet. App. C1-C15; 717 F.2d 329), and this Court denied review (465 U.S. 1007).

4. In 1983, the government initiated deportation proceedings against petitioner. The government alleged that petitioner should be ordered deported because he procured his visa by fraud or willful misrepresentation and because he assisted the Nazi government in persecution based on race, religion, and political opinion. The immigration judge ruled in the government's favor on both grounds. Relying on

---

[6]The district court found that petitioner had misrepresented his residences on his visa application by omitting any mention of his residence at Sachsenburg and Dachau (Pet. App. D13). The court also found that petitioner had misrepresented his organizational affiliations in his naturalization papers by omitting any mention of his service with certain SS units and by stating that he had never served in a concentration camp (*id.* at D13-D14).

These misrepresentations were material, the court found, because the evidence showed that petitioner would have been denied a visa if his application had disclosed his service in an SS Death's Head Unit at a concentration camp. Pet. App. D14-D15, D16. The court also found that petitioner's misrepresentations and concealments were willful. *Id.* at D16-D17.

principles of collateral estoppel, the immigration judge found that the facts proved during the denaturalization action established petitioner's deportability. In addition, the judge found from an independent review of the evidence that petitioner should be deported.[7]

The Board of Immigration Appeals affirmed (Pet. App. B1-B18). Relying on the factual and legal determinations made in petitioner's denaturalization proceedings, the Board held that petitioner was deportable because he procured his visa through fraud or misrepresentation and because he assisted the Nazi government in persecution (Pet. App. B13, B16).

5. The court of appeals affirmed (Pet. App. A1-A17). The court ruled that principles of collateral estoppel allow the government to rely in deportation proceedings on the factual and legal determinations made in denaturalization proceedings (*id.* at A7-A8). In addition, the court held that the Board of Immigration Appeals correctly relied on the findings and conclusions in petitioner's denaturalization proceedings, because the principal issue that was resolved in those proceedings (*i.e.*, whether petitioner had willfully misrepresented material facts in his visa and naturalization papers) was the same as the issue involved in his deportation proceeding (*id.* at A8-A11). Finally, the court of appeals held that petitioner's service as a concentration camp guard and as a supervisor of guards was sufficient to constitute assistance in persecution under the Holtzman Amendment, 8 U.S.C. 1251(a)(19), which requires the deportation of persons who assisted the Nazi government in persecution (Pet. App. A12-A14).[8]

---

[7]In September 1984, the immigration judge denied petitioner's application for a waiver of deportation or suspension of deportation, and the judge ordered that petitioner be deported to West Germany.

[8]The court of appeals also held that the Holtzman Amendment was not an unconstitutional bill of attainder and did not violate the Ex Post Facto Clause (Pet. App. A16-A17). Petitioner has not raised those claims in this Court.

ARGUMENT

1. Petitioner contends (Pet. 7-9) that collateral estoppel may not be invoked in deportation proceedings. The court of appeals properly rejected that claim.

Collateral estoppel is a well-settled doctrine in federal law. Under that doctrine, a final judgment on the merits of an action precludes a party from relitigating in a new action any question of fact or law actually litigated and necessary to the judgment in the first case, as long as the party against whom the earlier judgment is asserted had a full and fair opportunity to litigate the question. *United States* v. *Mendoza*, 464 U.S. 154, 158 (1984); *Allen* v. *McCurry*, 449 U.S. 90, 94-95 (1980); *Montana* v. *United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 & n.5 (1979). Collateral estoppel promotes several important goals: it protects litigants against the burden and vexation of relitigating the same questions with the same parties; it conserves scarce judicial resources; and, by reducing the chances of inconsistent decisions, it encourages finality and reliance on adjudication. *E.g., United States* v. *Mendoza*, 464 U.S. at 158.

The court of appeals correctly held that collateral estoppel should be applied in petitioner's deportation proceeding. As the court explained (Pet. App. A9-A10), the issue whether petitioner willfully misrepresented material facts in his visa application and naturalization petition, together with the underlying factual findings, was resolved in petitioner's denaturalization proceedings. Nothing in the text or legislative history of 8 U.S.C. 1252(b), which provides for a hearing in deportation cases, shows that Congress intended to prohibit the application of collateral estoppel in deportation cases.[9] To the contrary, the purposes underlying th

---

[9]H.R. Rep. 1365, 82d Cong., 2d Sess. 57-58 (1952); S. Rep. 1137, 82d Cong., 2d Sess. 29-31 (1952); see also *In re Fedorenko*, Interim Dec. 2963 (BIA Apr. 17, 1984), slip op. 7-8.

collateral estoppel doctrine suggest that the doctrine should be fully applicable in this context. See also *United States* v. *Demjanjuk*, No. 85-3198 (6th Cir. June 28, 1985), cert. denied, No. 85-846 (Dec. 16, 1985) (applying collateral estoppel in similar circumstances).

The decision below does not conflict with the ruling in *Title* v. *INS*, 322 F.2d 21 (9th Cir. 1963). Although the court there stated that collateral estoppel should not be applied to bar the relitigation in a deportation proceeding of issues determined in an earlier denaturalization proceeding, the court ultimately rested its judgment on the ground that applying collateral estoppel would be unfair in that case. Cf. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 332 (considerations of fairness may preclude the offensive use of collateral estoppel in certain cases).[10] The court stated that "[a]ssuming *arguendo* that the doctrine [of collateral estoppel] should be applied in deportation proceedings," collateral estoppel should not be applied in Title's case, for two

---

[10]Title's citizenship was revoked in 1955 for concealing his membership in the Communist Party. This Court later reinterpreted the standard for deporting Communist Party members. See, *e.g.*, *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957). The government relied entirely on the doctrine of collateral estoppel to demonstrate that Title should be deported because of his membership in the Communist Party. In reversing the deportation order, the Ninth Circuit stated that the doctrine of collateral estoppel should not be applied in deportation proceedings (322 F.2d at 23-24), but it went on to conclude that the application of collateral estoppel was unfair in that case, because the alien presented no evidence in the denaturalization action, and the law regarding deportation changed after the denaturalization case was decided (*id.* at 24-25). The court concluded that it was unfair to apply that doctrine in Title's case, because he might have proceeded differently if he had known of the new standard at the time of his denaturalization action (*id.* at 25). Accordingly, the court set the deportation order aside because the government in the deportation proceeding had relied solely on the documents from Title's denaturalization case (*ibid.*).

reasons (322 F.2d at 25). After Title was denaturalized, this Court had made it more difficult to deport members of the Communist Party like Title. Title also did not introduce any evidence at his denaturalization proceeding that would have allowed him to show that he should not be deported under the new standard (*id.* at 24-25). Thus, the court of appeals refused to apply collateral estoppel, because it would have led to an unfair result in that case.

As the court below pointed out (Pet. App. A7), this case is distinguishable from *Title*. First, despite petitioner's suggestion to the contrary, in this case there was no change in the law governing deportation between petitioner's denaturalization and deportation proceedings.[11] Second, unlike the alien in *Title*, petitioner testified and offered evidence in the suit to revoke his citizenship. Pet. App. D3, D6, D16. In these circumstances, the application of collateral estoppel in petitioner's deportation proceeding was not unfair, even under the analysis applied by the court in *Title*.

---

[11]Petitioner refers (Pet. 8) to the fact that after certain depositions were taken in the denaturalization suit, Congress amended 8 U.S.C. 1254(a) to render ineligible for discretionary relief from deportation persons who assisted the Nazi government in persecution. Petitioner suggests that his counsel would have attended the depositions and cross-examined witnesses if the new standard governing suspension of deportation had been applicable at the time. This argument is unpersuasive. Petitioner was fully aware at the time of the depositions of the possibility that he would face deportation if his citizenship were revoked, and he was also aware that the evidence in the denaturalization suit could be used in the deportation proceeding. The potential of deportation was a sufficient incentive for petitioner to participate fully in the litigation. Even before this amendment, suspension of deportation was a purely discretionary act of relief granted by the Attorney General. See *INS* v. *Rios-Pineda*, 471 U.S. 444 (1985); *INS* v. *Jong Ha Wang*, 450 U.S. 139 (1981). Petitioner had no reasonable basis for assuming that he would have been accorded the benefit of such discretionary relief.

2. Petitioner also contends (Pet. 9-13) that the court of appeals erred in applying collateral estoppel in this case, since the court of appeals did not find, in petitioner's denaturalization proceedings, that he willfully misrepresented material facts in his visa application. That fact-bound question does not warrant review by this Court. In any event, the district court clearly found (Pet. App. D12) that petitioner misrepresented his residences from 1934 to 1939 by claiming that he was a member of the "*Waffen SS*," rather than by listing his residence at the Sachsenburg and Dachau Concentration Camps. The court also rejected petitioner's claim (see *id.* at D11) that the term "*Waffen SS*" applied to all SS personnel.

The passage that petitioner cites from the court of appeals' opinion in the denaturalization case (Pet. App. C7) does not support his argument, as the court of appeals explained in this case (*id.* at A10-A11). In that passage, the court of appeals simply stated (*id.* at C7-C8) that it might be reluctant to uphold a finding of willful misrepresentation or concealment at the visa stage based solely on petitioner's statement in his visa application that he was a member of the "*Waffen SS*" during the 1934 to 1939 period, because petitioner might have intended to clarify his answer at some other point. The court of appeals concluded (*id.* at C8-C9), however, that other evidence credited by the district court showed that petitioner had no such intent and, in fact, repeated his misrepresentations at later stages of the process leading to petitioner's naturalization. For that reason, the court of appeals upheld the district court's finding that petitioner's misstatements in his visa application constituted willful misrepresentations (*id.* at C9).[12]

---

[12]Petitioner argues (Pet. 10-12) that the evidence was insufficient to show that he willfully committed material misrepresentations. As the court below held, collateral estoppel bars relitigation of this claim (Pet.

3. Finally, petitioner contends (Pet. 13-24) that the court of appeals misconstrued the Holtzman Amendment to the Immigration and Nationality Act, 8 U.S.C. 1251(a)(19). The Holtzman Amendment requires the deportation of any alien who, under the direction of the Nazi government, participated in the persecution of any person because of race, religion, national origin, or political opinion. The finding that by his service as a concentration camp guard, petitioner participated in persecution, within the meaning of the Holtzman Amendment, served as an alternative basis to support petitioner's deportation order.

Petitioner contends that service as a guard at a Nazi concentration camp does not by itself constitute assistance in persecution within the meaning of the Holtzman Amendment. According to petitioner (Pet. 24), the Holtzman Amendment requires proof of "active personal acts of brutality." That claim lacks merit.[13]

Section 2 of the Displaced Persons Act of 1948 (DPA), ch. 647, 62 Stat. 1009-1010, amended by Displaced Persons Act of 1948 Amendments, ch. 262, §§ 1-3, 64 Stat. 219-220, authorized European refugees to emigrate to the United States, but it specifically excluded persons who had

---

App. A10 n.2), and petitioner's fact-bound claim would not warrant review by this Court in any event. In fact, the immigration judge considered the additional evidence that petitioner offered at the deportation hearing and found that petitioner's own testimony supported the earlier finding that he made misrepresentations in his visa application (slip op. 17).

[13]Petitioner also refers (Pet. 13) to the fact that some of the evidence introduced against him in the denaturalization proceedings consisted of depositions at which he did not cross-examine the deponents. Petitioner was free to attend those depositions, which were held in California and Europe, but he chose not to do so, despite the fact that the government offered to pay his attorney's travel expenses plus a per diem for food and lodging (Pet. App. C12).

"assisted the enemy in persecuting civil[ians]." *United States* v. *Kairys*, 782 F.2d 1374, 1377 n.3 (7th Cir. 1986), cert. denied, No. 85-1752 (May 27, 1986). In *Fedorenko* v. *United States*, 449 U.S. 490, 512-513 n.34 (1981), this Court held that the defendant was ineligible for a visa under the DPA because he served as an armed perimeter guard at the Treblinka concentration camp. Congress intended that interpretations of the DPA serve as a guide for the construction of the Holtzman Amendment. See H.R. Rep. 95-1452, 95th Cong., 2d Sess. 2-3, 4-8 (1978). Petitioner, a former member of the SS, a former concentration camp guard, and a former supervisor of other guards, is certainly no less culpable than Fedorenko for the persecution inflicted on concentration camp inmates. Accordingly, the court of appeals correctly applied this Court's decision in *Fedorenko* to the facts of this case.[14]

Petitioner argues that the Holtzman Amendment is limited to "war crimes" or "crimes against humanity," as those terms were used by the Nuremburg Tribunal, but his argument is inconsistent with the legislative history of the statute. Congress made it clear that these concepts were a guide to the meaning of the term "persecution" in 8 U.S.C. 1251(a)(19), but were not the sole source for the meaning of the term. H.R. Rep. 95-1452, *supra*, at 2-3, 4-8.

---

[14]Petitioner seeks (Pet. 16) to distinguish *Fedorenko* on the ground that it involved a "death" camp, while Sachsenburg and Dachau were "labor" camps. This distinction, as the court of appeals found (Pet. App. A15), has no legal significance. As the court of appeals noted, each of the camps was used to punish Jews and political opponents of the Nazi regime (*id.* at A14). Petitioner also argues that he was unaware of persecution at the camps. The court of appeals found this assertion "incredible" (*ibid.*). None of petitioner's assertions regarding the facts of his service or the nature of the Sachsenburg and Dachau concentration camps warrants review by this Court. Those facts have been reviewed by two trial courts, by the Board of Immigration Appeals, and by two panels of the court of appeals. No judge has credited petitioner's version of the facts.

Finally, the decision below does not conflict with the decisions in *United States* v. *Sprogis*, 763 F.2d 115 (2d Cir. 1985), and *Laipenieks* v. *INS*, 750 F.2d 1427 (9th Cir. 1985), as petitioner claims (Pet. 24). As the court of appeals explained (Pet. App. A14), both cases involved local policemen who were not members of the SS, and neither defendant was involved in the operation of concentration camps. By contrast, as the court of appeals pointed out (*id.* at A13), the duties of a concentration camp guard necessarily entailed assistance in the persecution of inmates. That would not necessarily have been true for a local policeman.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

MICHAEL WOLF
Attorney

MARCH 1987